

#171

INTERIM DECISION



IN THE MATTER OF THE ONTARIO HUMAN RIGHTS
CODE R.S.O. 1980, CHAPTER 340.

AND IN THE MATTER of the complaints made
by Bahjat Tabar of Scarborough, Ontario,
and by Chong Man Lee of Toronto, Ontario,
that West End Construction Limited of
625 Evans Ave., Toronto, and David Scott,
Vice-President of West End Construction
Limited, discriminated against each one of
them and a class of persons because of
race, nationality, ancestry, and/or place
of origin, in the contravention of paragraphs
3(1)(a) and/or (b) of the Ontario Human Rights
Code, R.S.O. 1980, c. 340.

BOARD OF INQUIRY

Professor Peter A. Cumming

Appearances:

Ms. Janet E. Minor

Counsel for the Ontario Human Rights
Commission and the complainants,
Bahjat Tabar and Chong Man Lee.

Mr. John Richardson

Counsel for the Respondents, West
End Construction Limited and David
Scott.

Interim Decision with respect to Preliminary Issues raised at the Commencement of the Hearing.

At the commencement of this hearing, counsel for the Respondents made a motion (see Exhibit #3) on behalf of West End Construction Limited, asking the Board of Inquiry to dismiss the Complaints of Bahjat Tabar and Chong Man Lee of May 27, 1981, and May 28, 1981, respectively. Several grounds were raised.

To understand these issues, it is necessary to note that Chong Man Lee first signed a Complaint March 14, 1979, (No. "A" to Exhibit #3) and Bahjat Tabar first signed a Complaint (No. "B" to Exhibit #3) dated May 18, 1979. However, Mr. Lee later signed a second Complaint, dated May 22, 1981 (No. "C" to Exhibit #3) (hereafter called the "Lee Complaint") and Mr. Tabar later signed a second Complaint, dated May 27, 1981 (No. "D" to Exhibit #3) (hereafter called the "Tabar Complaint").

Both of Mr. Lee's Complaints are virtually identical in terms of the "Particulars of Discrimination", and similarly, both of Mr. Tabar's complaints are virtually identical in terms of the "Particulars of Discrimination". There are, however, some other differences between the first and second overall Complaints of each gentleman, as will be later noted.

(1) Misnomer of Respondent

First, it was submitted that both the Lee and Tabar Complaints constituted a nullity in that the Lee Complaint (No. "C" in Exhibit #3) named "West End Construction Co. Ltd." and the Tabar Complaint (No. "D" in Exhibit #3) named "West End Construction Co." as a respondent, neither of which entities exist at law, whereas the correct name of the business entity against whom both Complaints were intended to be directed against

is "West End Construction Limited".

It is very clear that the allegations of both of the Complaints of Mr. Lee are intended to be directed against the business entity which is correctly known, and exists in law, as "West End Construction Limited". Moreover, this was known to West End Construction Limited and its principals and solicitor since first being made aware of the Complaint in the spring of 1979 (See No. "F" of Exhibit #3).

Incidentally, as of at least June 14, 1979, the Ontario Human Rights Commission was also aware that the business entity was in fact "West End Construction Limited" (See No. "F" to Exhibit #3), and, therefore, at the point in time, 1981, of the execution of the second Lee Complaint and second Tabar Complaint, the correct description of the intended business entity Respondent, "West End Construction Limited", should have been used in the drafting of such second Complaints. Instead, the second Complaints continued the misdescription of the entity from the first Complaints, and also continued the difference in description of the entity as between the Lee Complaint and the Tabar Complaint. More care should have been exercised by the Commission in drafting the Complaints. However, there was absolutely no conceivable prejudice to West End Construction Limited by reason of the slight misdescription in the first Complaints and the continuing misdescription in the second Complaints. West End Construction Limited always knew full well that it was the business entity against whom all Complaints were directed (see No. "F" of Exhibit #3).

Nevertheless, are the Complaints a nullity by reason of the misdescription of the corporate Respondent?

In Matthew v. Seven City Development Company Limited¹ the Complaint had originally been laid against "Seven City Developments Limited". The board of inquiry allowed an amendment to the Respondent's name. Chairman Tarnopolsky had found that the corporate Respondent had been in no way prejudiced by the misnomer because it had referred to itself as "Seven City Developments" in its newspaper ads and correspondence.

In Pratt v. H.A. Roberts Gallery of Homes Ltd.² the complaint had named the Respondent as "H.A. Roberts Real Estate Company". The Alberta board of inquiry allowed the amendment. Under the Alberta Individual Rights Protection Act³ complaints must be filed within six months of the occurrence of the discriminatory act. The amendment of the Respondent's name was allowed after the time limit had passed because the complaint on the face of it had been filed within time.

In civil cases, amendments are allowed after the limitations period has passed where the defendant has been simply misdescribed and has suffered no prejudice because he knew all along that the proceedings

-
1. February 21, 1973 (Ont.--Tarnopolsky).
 2. April 15, 1978 (Alta.--Porkka).
 3. R.S.A. 1980, c. I-2, s.17(3).

were against him. In Russell v. Diplock-Wright Lumber Co.⁴ the court allowed the defendant's name to be amended, from "Diplock-Wright Lumber Co. Ltd.", where the plaintiff had believed that the defendant was incorporated when it was in fact a partnership. In Clark v. Thomas Gaytee Studios Inc.⁵ the court allowed an amendment of the Defendant's name after the limitation period had run. The plaintiff had sued the individual, "T.J. Gaytee", not realizing that he had incorporated. The same result was reached on similar facts in Chretien v. Herrman & Plaza⁶ where the individual "Jose Plaza" had been named as defendant rather than the company "Jose Plaza Co. Ltd.".

It is clear that the Code provides a Board of Inquiry broad discretion to add any person as a party.

18.--(1) The parties to a proceeding before a board of inquiry with respect to any complaint are,

- (a) the Commission, which shall have the carriage of the complaint;
- (b) the person named in the complaint as the complainant;
- (c) any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act;
- (d) any person named in the complaint as alleged to have contravened this Act; and
- (e) any other person specified by the board upon such notice as the board may determine and after such person has been given an opportunity to be heard against his joinder as a party.

4. (1910), 15 B.C.R. 66.

5. [1930] 3 W.W.R. 489 (Sask. C.A.).

6. [1969] 2 O.R. 339 (Ont. C.A.).

In the instant situation, I made an order that West End Construction Limited be named as the respondent party in respect of both the Lee and the Tabar Complaints.

(2) Adding a Respondent

Mr. Lee's second Complaint adds Mr. D. Scott, Vice-President of West End Construction Limited as an individual Respondent. It is quite clear from Mr. Lee's first Complaint that Mr. Scott was the principal of the corporate Respondent with whom he dealt at all times. In essence, Mr. Lee was complaining about Mr. Scott. There is no prejudice at all to Mr. Scott due to the lapse of time in Mr. Scott being named a Respondent, being in 1981 at the time of the signing of the second Complaint. Even if he had not been named at that point in time, I would have exercised my discretion under paragraph 18(1) (e) of the Code to add him as a Respondent at the hearing if a motion had been made.

A similar situation occurred in Matthew v. Seven City Development Company Limited⁷. In that case, the board of inquiry, at the commencement of the hearing, joined three officers of the corporate Respondent. The board said that they were not in any way prejudiced by their joinder:

As far as the personal Respondents were concerned, it was quite clear that all three were involved either in the events concerning the attempted rental of an apartment by Mr. Matthew, or in the subsequent correspon-

7. Supra, note 1.

dence or discussions with the Ontario Human Rights Commission. All three personal Respondents had been subpoenaed some time before the Hearing, and were at the Hearing, and did not present any arguments which would seem to indicate that they were in any way prejudiced by being added as parties respondent at the Hearing. 8

Mr. Scott, like those three personal respondents, has been intimately involved with the circumstances of the complaint and with the proceedings prior to the hearing.

In Nawagesic v. Mr. and Mrs. Rauman⁹, where I was constituted a Board of Inquiry, the respondents held title as joint tenants to an apartment in respect of which it was alleged they, as owners, had failed to rent to the Complainant because of discrimination on a prohibited ground. However, the Complaint had been made out against only Mrs. Rauman and it was not until the day of the hearing that a motion was made to add Mr. Rauman as a party respondent. In respect of the motion I held:

Generally, the preferred course of action when the Commission wishes to add a new party to a proceeding would be to give as much notice to the person affected as possible of the intended application before the Board of Inquiry, or even seek to apply to the Board for the person to be added as a party, well in advance of the actual hearing.

In the instant situation, I agreed to adding Mr. U.O. Rauman as a person named in the complaint as alleged to have contravened the Code, on the basis that there was no actual prejudice by the delay in his becoming a party to the proceeding, as he was fully familiar with the matter from the time of the making of the complaint in the spring of 1976. I allowed him to speak against his joinder as a party, and at that point Mr. Siimes stated he had authority to represent Mr. Rauman in respect to the matter. I offered

8. Id, at 2.

9. February 14, 1978 (Ont.--Cumming)

Mr. Siimes, as counsel at that point for Mr. Rauman, an adjournment of the hearing but it was declined. In my view, the overall public policy of the Code is furthered by a Board of Inquiry having a broad discretion to add parties to a proceeding before it, and this broad power is given by s.14b (1)(e) of the Code. Accordingly, I allowed the Complaint to be amended and I specified Mr. U.O. Rauman to be a party to the proceeding before the Board of Inquiry, and the hearing proceeded. 10

In Finlayson v. City of Winnipeg¹¹ the Complainant who had been forced to retire from the police force at 60 laid a complaint against the City of Winnipeg and the Winnipeg Police Senior Officers' Association believing that they were responsible. At the hearing before the board of inquiry it became apparent that it may have been the Police Commission who had made him retire. The Police Commission objected to being added as a Respondent on the grounds that subsection 19(1) of the Manitoba Human Rights Act¹² requires that a complaint be filed within six months of the alleged contravention of the Act. The Police Commission argued that no parties can be added after the six month period has passed. The board rejected the Police Commission's argument saying that subsection 19(1) only requires that a complaint be filed within six months. It does not preclude the board from adding more parties. The board said:

The Human Rights Act provides a mechanism enabling persons who feel they have been discriminated against to seek redress. Proceedings are

10. Id., at 3-4.

11. (1981), 1 C.H.R.R. D/429 (Man.--Rothstein).

12. S.M. 1970, c.104.

commenced by the filing of a complaint with The Human Rights Commission. The Commission conducts an investigation. Thereafter, there is provision for conciliation proceedings. Finally, the Human Rights Commission can recommend to the Attorney-General that a Board of Adjudication be appointed. During any one or more of the processes, persons who may have contravened the Act might be identified.

While various provisions of the Act indicate that these processes and proceedings should not be delayed, the only specific time limit is the one requiring the filing of a complaint within six months of the alleged contravention of the Act. Had it been the intention of the Legislature to restrict the addition of parties to a complaint to a specified time period, it could easily have done so. A time limit could have been attached to Section 26(e) itself. This was not done.

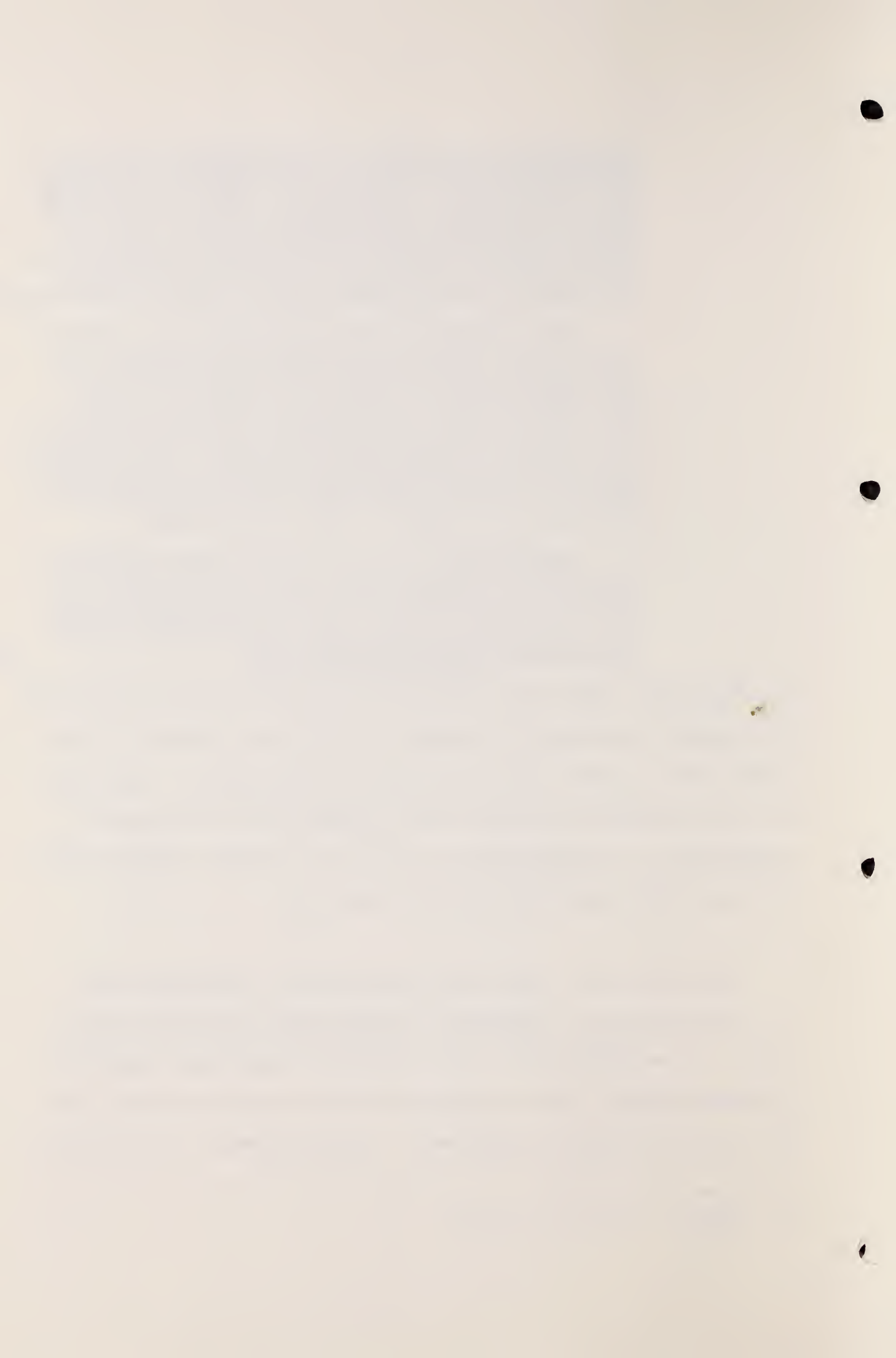
Accordingly I am of the view that a Board of Adjudication, after six months from the date of an alleged contravention, either upon application or of its own volition, may, under Section 26(e), add persons as parties who may be found to have contravened The Human Rights Act.

13

In that case, there was confusion as to who was responsible for the alleged violation of the Act. It was also unclear to the Board which counsel represented which Respondents. Therefore, all the parties who may have been responsible were added as Respondents. The Respondents were all so closely related that the Board had difficulty sorting them out.

Since 1979, Mr. Scott has had notice of the particulars of discrimination. Moreover, an adjournment could have been given, if requested, and if Mr. Scott had shown any basis of a need for further time to prepare his case given the fact that he was an individual respondent. No adjournment was requested,

13. Supra, note 11, at D/430.



and this is not surprising as Mr. Scott knew, at the latest as of the second Complaint in 1981, that the Complainant, Mr. Lee, was complaining against him as an individual Respondent. Therefore, I ruled that Mr. Scott was properly a respondent party and further ruled that his full name, David Scott, should be used and that David Scott is the named individual Respondent in the second complaint of Mr. Lee.

The same argument was made about David Scott being an individual Respondent in respect of Mr. Tabar's second Complaint. I ruled in favour of the Commission and Mr. Tabar as well in this regard, for the reasons given above in discussing Mr. Scott being an individual Respondent in respect of Mr. Lee's Complaint. Moreover, it should be noted that "Mr. D. Scott" is, in my view, named as a Respondent in the first Complaint of Mr. Tabar, and Mr. Tabar did not simply "include his name as part of the address for 'West End Construction Co.'" as argued in the affidavit (paragraph #13) in support of the motion to dismiss. Similarly, in my view, Mr. D. Scott is a named individual Respondent in Mr. Tabar's second Complaint, and not just part of the mailing address.

(3) Failure to proceed with first Complaints

Another argument for dismissing the Complaints was on the basis that:

...to the extent that the said Complaints relate to allegations of discrimination against a 'class of persons distinguishable by race, colour, nationality, ancestry and place of origin,' dismissing the said claims as having been already determined by reason of the failure to proceed with the same Complaints as dated May 18, 1979, and March 14, 1979, respectively.

The affidavit of the solicitor for West End Construction Limited sets forth the basis for argument in this regard.

9. I am obliged to conclude that the Commission declined to proceed with Exhibit "A" because the consent of the persons alleged to have been offended was not provided in accordance with Section 15(2) of the Ontario Human Rights Code, R.S.O. 1980, Chapter 340. To the best of my knowledge, such consent has not been provided with respect to Exhibit "C" to the date of this my Affidavit and I am obliged to conclude that the Commission required Mr. Lee to execute Exhibit "C" incorporating the previously non-existent allegation of discrimination against Mr. Lee as a precondition to proceeding to a hearing. 13a

The solicitor makes a presumption when he says he "is obliged to conclude", which is simply a speculative presumption. Moreover, subsection 15(2) does not, of course, provide that the offended person must consent, only that the Commission "may" require a consent.

Respondents' counsel asserts that the claims arising from the Complaints have "been already determined by reason of the failure to proceed with the same Complaints as dated May 18, 1979, and March 14, 1979, respectively".

13a. The same argument was asserted in respect of Mr. Tabar's Complaints - paragraph #16 of the Affidavit of Richard James Hassard in Exhibit #3.

This assertion, in my view, makes no apparent sense. The referred to Complaints are, with amendments, being proceeded with through the present hearing. They have not "been already determined" and the speculative assertion in paragraph 9 of the affidavit about the Commission's view as to "consent" coupled with the solicitor's apparent misreading of subsection 15(2) of the Code does not support the argument that the Complaints have "been already determined."

(4) Class Action

The first Complaints were brought in respect of a "class of persons distinguishable by race, colour, nationality, and place of origin." Can a Complaint be initiated in respect of such a group?

Under the Interpretation Act, R.S.O. 1980, c.219, s.27(j), in interpreting a statute, unless the contrary intention appears, the singular includes the plural.

Thus, the word "person" in subsection 15(2) of the Code embraces persons.

Subsection 15(3) of the Code reads as follows:

(3) Where the Commission has reason for believing that any person has contravened a provision of sections 1 to 5 in respect of a person or group of persons, the Commission may initiate a complaint.

Note that this paragraph speaks of a "group of persons".

Subsections 15(1) and (2) provide:

15.--(1) Any person who has reasonable grounds for believing that any person has contravened a provision of this Act may file with the Commission a complaint in the form prescribed by the Commission.

(2) Where a complaint is made by a person other than the person whom it is alleged was dealt with contrary to the provisions of this Act, the Commission may refuse to file the complaint unless the person alleged to be offended against consents thereto.

Clearly, these subsections allow an individual "who has reasonable grounds" to initiate a complaint, even though he is alleging it was another person discriminated against, although in such instance the Commission may refuse to file the complaint "unless the person alleged to be offended against consents thereto".

However, subsection 15(2) of the Code does not make it mandatory for the Commission to receive a complaint unless the person(s) alleged to be offended have consented to the Complaint.

It seems to me that subsections 15(1) and (2) allow an individual to bring a complaint on behalf of more than one person, even a "class of persons", as did the first Lee and Tabar Complaints, although it is only subsection 15(3) that

refers expressly to a complaint "in respect of a...group of persons". The intent of subsection (3), in my opinion, is simply to give the Commission itself the power to initiate a complaint.

Section 3, under which these Complaints were laid, prohibits discrimination against a class of persons.

3.--(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,

(a) deny to any person or class of persons occupancy of any commercial unit...; or

(b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit...,

because of race...colour...nationality...or place of origin of such person or class of persons or of any other person or class of persons. (emphasis added)

This would seem to suggest that a complaint may be laid on behalf of a class of persons.

In Black United Front v. Bramhill¹⁴ a complaint was laid on behalf of an undefined class of blacks with respect to buttons containing a phrase that referred to blacks in a derogatory manner. The fact that the boundaries of the class were unclear was not questioned by the board. It decided for the Complainant and ordered the buttons destroyed.

Most boards in Canada, however, have required that the class allegedly discriminated against be clearly defined.

14. (1981), 2 C.H.R.R. D/249 (N.S.--Charles).

In Huck v. Canadian Odeon Theatres Ltd.¹⁵ the Complainant alleged that he had been denied access to the Respondent's cinema because he was in a wheelchair. He initially filed the complaint on behalf of all handicapped persons in wheelchairs. The board cited a provision in the Saskatchewan Human Rights Code¹⁶ which is identical to section 18(1) of the Ontario Code that lists the parties to a proceeding before the board of inquiry. The list does not include a class of persons or a representative of such a class. The Saskatchewan board held that the list is exhaustive and does not allow a class action to be brought unless each individual member of the class is named as a Complainant. The Complainant, in that case, was permitted to amend his complaint to allege solely that he was personally discriminated against.

In Levesque and Tardif v. The Daily Gleaner¹⁷ complaints were laid on behalf of all French Canadians with respect to two letters containing derogatory remarks about French Canadians that were published in the Respondent newspaper. The board discussed the definition given to the word "person" in the New Brunswick Human Rights Act¹⁸ and held that it narrowed the definition of "class of persons". The New Brunswick Act definition of "person", which is identical to the definition in the Ontario Code, reads thus:

15. (1981), 2 C.H.R.R. D/351 (Sask.--Bekolay).

16. S.S. 1979, c. S-24.1.

17. September 10, 1974 (N.B.--Webster).

18. R.S.N.B. 1973, c. H-11, as amended.

"person" in addition to the extended meaning given it by the Interpretation Act, includes an employment agency, an employers' organization and a trade union.

The Interpretation Act simply defines "person" to include corporations and estates.¹⁹ The board in Levesque set out these two definitions of "person" and said:

The Human Rights Act by defining the word "person" in this way does not provide the machinery to deal with a complaint by one or two people on behalf of a large group of people with the same ethnic background.

The board held that, for this reason, it did not have jurisdiction to make orders against the Respondent.

With respect, it is my opinion that this interpretation runs counter to the intent of the Code which is to protect all persons and classes of persons from discrimination on prohibited grounds. Section 3 prohibits discrimination against "any person or class of persons". If there is no means by which a class of persons may enforce their rights, such rights would be rendered nugatory. The board in Levesque, in effect, repealed the provisions in the New Brunswick Act that prohibited discrimination against a class of persons.

Furthermore, as "person" is defined to include, as well as individuals, certain defined groups such as corporations and unincorporated associations, the legislature could not have

19. R.S.O. 1980, c. 219, s. 30 para. 28.

intended to limit "class of persons" to the same groups. In the context of the Code the types of classes referred to are those composed of persons having a characteristic in common which is a prohibited ground for discrimination. For example, section 3 of the Code prohibits discrimination against "any person or class of persons" with respect to rental of any commercial units or housing accommodation "because of race...colour ...nationality or place of origin of such person or class of persons or of any other person or class of persons." The class of persons the Code is referring to could only be a class of persons defined by their common race, colour, nationality or place of origin.

Furthermore, section 15 (1) of the Code is broad enough to permit a complaint to be filed on behalf of a class of persons. The provision in the New Brunswick Act under which Levesque was decided is much narrower than section 15 of the Ontario Code. In New Brunswick a person could only file a complaint if he personally claimed "to be aggrieved because of an alleged violation of the Act".²⁰ Under 15 (1) of the Ontario Code any person may file a complaint if he believes that the Code has been violated. He need not be personally aggrieved. Subsection 15(3) of the Ontario Code permits the Commission to initiate a complaint where it has reason

20. Supra, note 18, s.17.

for believing that any person has contravened the Code in respect of "a person or group of persons". Thus the Commission may initiate a complaint on behalf of a class of persons.

Subsection 18(1)(a) provides that the Commission shall be a party to the proceedings and that it shall have carriage of the complaint. There is no stipulation that the Commission cannot proceed with a complaint on behalf of a class of persons.

Subsection 18(1)(b) provides that the person named in the complaint as the complainant shall be a party to the proceedings before the board of inquiry. Subsection 18(1)(c) provides that "any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act" shall be a party to the proceedings. As there is a separate provision making aggrieved persons parties to the proceedings in subsection (c), a requirement that the complainant be personally aggrieved cannot be read into subsection (b).

In my opinion, complaints can be filed on behalf of a class of persons under the Ontario Human Rights Code.

(5) Adding Complainants

Nevertheless, second Complaints were filed adding Mr. Lee and Mr. Tabar as individual Complainants. Counsel for

the Respondent sought to dismiss the second Complaints on the basis that an additional Complainant was named in each one. The first Complaints, in 1979, had been brought on behalf of a "class of persons distinguishable by race, colour, nationality and place of origin" whereas Mr. Lee's second Complaint, in 1981, added himself as a party in respect of whom the Complaint was brought, and Mr. Tabar's second Complaint, in 1981, likewise added himself as a party in respect of whom the Complaint was brought. Both Mr. Tabar and Mr. Lee were tenants under commercial lease in respect of a building, and the essence of the allegations in the Complaint of each was that West End Construction Limited, as manager of the building for the owner, would not allow their leases to the premises to be assigned or sub-let on the alleged reason that the prospective new tenants were not suitable to West End Constuction Limited and its officer, Mr. David Scott, because of their respective "race, colour, nationality, ancestry and place of origin", contrary to paragraphs 3(1)(a) and/or (b) of the Code.

Sub-section 18(1)(e) of the Code permits the Board of inquiry to join any person as a party provided notice is given and provided that "such person" is given an opportunity to be heard against his joinder. Only the party being joined may object to his joinder. Other parties may not. Thus

only Mr. Lee and Mr. Tabar may object to their joinder as Complainants. The Respondent West End Construction Limited may not object to the joinder of Complainants.

In Cooper v. Belmont Property Management²¹ the employment of a superintendant couple in an apartment building had been terminated. The husband was black and the wife, white. A board of inquiry was appointed to look into the husband's complaint that his employment had been terminated because of his race and colour. The wife had not filed a complaint with respect to the termination of her employment. At the hearing she sought to be added as a party and to have her complaint heard. She alleged that her employment had been terminated because of her marital status (that being that she was married to a black man). The board cited subparagraph 14c(a) (now paragraph 19(a)) and decided that it could hear her complaint.

19. The board, after hearing a complaint,

(a) shall decide whether or not any party has contravened this Act.

The board said:

In my opinion, that section does not restrict the decision of a board to determining the specific complaint. Rather it requires the board to decide whether the proceeding discloses any contravention of the Code.

Thus, "to hear and decide...the complaint made by Roland Cooper" means to decide it as required by the Code. The Code in turn requires that the decision be whether or not the proceedings disclose any contravention of the Code.

22

21. July 27, 1973 (Ont.--Ratushny).

22. Id., at 6-7.

Chairman Ratushny then cited Section 8 of the Statutory Powers Procedure Act²³ which requires that notice be given to a person where his character, propriety of conduct or competence is in issue, and said:

In my opinion, the allegations of contraventions of the Code which arose indirectly in the course of the proceedings were so related to the actual complaint of Roland Cooper that the parties against whom a finding of contravention might be made could suffer no prejudice because of the absence of specified allegations under s. 8. 24

In that case the complaints were dismissed because the Complainants were unable to prove their allegations.

In civil actions plaintiffs may be added after the limitations period has run where there is no prejudice to the defendant. In Re Palermo Bakery Ltd. and Dominion of Canada General Insurance Co. et al.²⁵ the owner of the contents of a building who sued to recover on an insurance policy was allowed to add as plaintiff the owner of the building after the limitations period had run because the defendant suffered no prejudice. It, at all times, knew of the loss and by whom the insurance moneys were recoverable. Lerner J. criticized the previous rule with respect to amendments after the limitations period had run whereby an amendment was allowed if the plaintiff

23. R.S.O. 1980, c. 484.

24. Supra, note 21, at 7.

25. (1976), 12 O.R. (2d) 50 (H.C.).

had merely been misnamed but not allowed if the wrong plaintiff had been chosen. He said:

However, there is little difference between the situation where, on the one hand the plaintiff is mistaken as to who has title to sue, and on the other he is mistaken as to the correct name of the plaintiff. One asks the question: Should this distinction be maintained where it is of no consequence in the sense that the opposing party was never actually misled or injured by the error so as to be prejudiced in defending on the merits? I find comfort in the persuasive and well-reasoned article by Professor Watson entitled "Amendment of Proceedings after Limitation Periods", in 53 Can. Bar Rev. 237 (1975).

26

Lerner J. adopted Professor Watson's functional approach which is to allow the amendment unless the defendant would in fact be prejudiced. Professor Watson said that the interests of the defendant that had to be protected were his interest in not having to preserve or seek out evidence after the limitation period had elapsed and his interest in economic and psychological security in not having an old claim hanging over him.²⁷ He suggested:

As to the "evidentiary interest" the amendment should only be refused when the defendant can show that through lack of notice the change sought will require the use of evidence now unavailable to him but which would have been available had the action been constituted in this manner at the outset. With regard to his "interest in security" the amendment should be permitted unless the defendant can show that through lack of notice of the claim now sought to be asserted he actually changed his position, to his detriment, in reasonable reliance on the fact that the claim now sought to be asserted was dead.

28

26. Id., at 62.

27. 53 Can. Bar Rev. 237, at 272.

28. Id., at 277

Professor Watson predicated the permitting of these amendments on the defendant having been given timely notice of the plaintiff's original claim.

In Palermo Lerner J. said:

Generally speaking, today cases are decided on the merits rather than on procedural niceties, although the Courts continue to retain a reluctance to apply this approach to the historic restrictive attitude against permitting amendments after the expiration of the time prescribed for bringing the action. 29

...

The results of carelessness or negligence on the part of a solicitor should not be visited upon his client to make him suffer losses which ordinary skill and care would have prevented. Nor should a defendant be entitled to take advantage of that situation in these particular circumstances.

...

I find support for my approach (in part) to the facts before me in the further words of Middleton, J., at p. 32 therein:

I place the exercise of this discretion on the power to relieve against mistakes, slips, blunders, and even stupidity of parties in the course of litigation, which I regard as quite distinct from the power assumed by equity to relieve from default under a foreclosure decree.

My view is based, in part, on the exercise of my discretion to grant relief. The guiding principle has often been stated in such cases to be "the advance ment of justice, the determination of the real matter in dispute and judgment according to the very right and justice of the case, provided that no injury or prejudice is occasioned to an opposing party which cannot be compensated for in costs": Western Caissons Ltd. v. Toronto Transit Com'n et al., [1966] 2 O.R. 528 at p. 537 [per Thompson, J.]. 30

29. Supra, note 25, at 55.

30. Id. at 64.

Palermo has been followed in Balfour Guthrie (Can.) Ltd. v. Victoria Shipping Co.³¹ and in W.H. Violette Ltd. v. Ford Motor Co. of Can.³². It was distinguished in McEvoy v. Gen. Security Ins. Co. of Can.³³ as a case of mistake by the plaintiff's solicitors. In that case the court reverted to the old distinction between misnomer and mistake in deciding not to allow the addition of another plaintiff despite the fact that it found that the defendant would not in fact have been prejudiced by the amendment.

In Ont. Hosp. Services Comm. v. Reg. of Motor Vehicles³⁴ and in Ont. Hosp. Services Comm. v. Barsoski³⁵, where the O.H.S.C. had sued for expenditures made by itself on behalf of injured persons, the injured parties were allowed to join after the expiry of the limitation periods to sue for their own damages. The courts allowed the joinder because there was only one cause of action: negligence for personal injury to an injured person. Timely issuance of the writ by the O.H.S.C. had informed the defendants that an action was being brought in respect of personal injuries.

31. (1978), 91 D.L.R. (3d) 88 (B.C.S.C.).

32. (1980), 31 N.B.R. (2d) 394 (N.B.Q.B.).

33. (1980), 29 O.R. (2d) 461 (H.C.).

34. [1969] 1 O.R. 666 (H.C.).

35. [1973] 3 O.R. 720 (C.A.).

Likewise, the complaints against West End Construction Limited are the same and its defences on the merits are the same regardless whether Mr. Lee and Mr. Tabar are added as Complainants. If a plaintiff can join in a civil action out of time for his own personal damages, then surely these Complainants can join in this action for compensation for their personal losses.

I allowed the second Complaints to stand with the addition of Mr. Lee and Mr. Tabar as individual parties in respect of whom their Complaints were brought, because there was no possible prejudice to the Respondents by the additions of them as individuals in respect of whom the second Complaints were brought. As I have previously said, the "particulars of discrimination" did not change in substance from the first to second Complaints. The Respondents were fully aware in 1979 of the factual situations allegedly giving rise to discrimination. The individual Complainants remained the same; the only addition in the second Complaints was that they were now brought in respect of the individual Complainants as well as in respect of a "class of persons". In essence, the second Complaints were simply amended versions of the first Complaints. That is, I do not believe the second Complaints have to be regarded as "fresh" complaints, but rather are viewed properly as simply the first Complaints with amendments. In my opinion the Complaints can

be amended and the board has the discretion to allow the amendments right up to, and at, the hearing.

If I am wrong in this regard, and if the second Complaints are correctly regarded as "fresh" Complaints, then I believe the second Complaints should still stand as being brought in respect of the individual Complainants as well as a "class" for the reasons I have given - there is no prejudice whatsoever to the Respondents due to the lapse of time from the first Complaints to the second Complaints in respect of this addition to the second Complaints.

However, if the second complaints are "fresh" Complaints, the Respondents argue as well that they have not been brought in time and are barred by the provisions of paragraph 45(1)(b) of the Limitations Act³⁶. I shall deal with this argument below.

(6) Time Limits

The Respondents asserted that both the Lee and Tabar Complaints of 1981 were barred by the provisions of paragraph 45(1)(h) of the Limitations Act³⁷.

45.--(1) The following actions shall be commenced within and not after the times respectively herein-after mentioned,

(h) an action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose.

36. R.S.O. 1980, c. 240.

37. Id.

This contention rested upon several asserted bases.

First, the Tabar Complaint refers to a factual situation that ends as of about November, 1976. Thus, his first Complaint, dated May 18, 1979, is more than two years later than the factual situation he is complaining of. His second Complaint, if it is to be viewed as a "fresh" Complaint (rather than an amended Complaint as I consider it to be) is dated May 27, 1981, more than five years after the situation complained about occurred. As I have already said, the particulars of both complaints are identical, so that the Respondents had notice of all the particulars of discrimination being complained about, as of May 18, 1979, the date of the first Complaint. Mr. Tabar had been contacted by the Ontario Human Rights Commission in its investigation of the Complaint of Mr. Lee, and as a result of his discussions with the Commission at that time, Mr. Tabar initiated his own Complaint.

Second, the events with respect to which Mr. Lee filed his Complaints allegedly took place February 1, 1979. His first Complaint, dated March 14, 1979, was filed within the two year period. However, the second Complaint, dated May 22, 1981, was filed more than two years after the alleged contravention occurred. Also, Mr. David Scott was not named as a party in respect of the first Complaint of Mr. Lee, but

only in the second Complaint. If the second Complaint is to be viewed as a "fresh" Complaint, can a Complaint be made against a person May 22, 1981, that relates to a factual situation ending as of about March, 1979, more than two years previously?

Finally, it was only with the second Complaints of Mr. Lee and Mr. Tabar, in 1981, that such complaints were also brought in respect of themselves, as individuals, in addition to a "class of persons". Were the second Complaints in respect of themselves as individuals then outlawed by reason of being more than two years subsequent to the complained of factual situations?

The Respondents' argument, as made in the affidavit accompanying the motion, was as follows:

10. Now shown to me and marked as Exhibit "E" to this my Affidavit is a copy of Section 45(1)(h) of the Limitations Act, R.S.O. 1980, Chapter 240, requiring that an action for a penalty, damages or a sum of money given by any statute to the Crown or the party aggrieved, be commenced within two years after the cause of action arose.

11. I note that the Complaint of Mr. Lee, upon which the Commission is proceeding, was not filed until May 22, 1981, more than two years following the date of the alleged contravention, namely, February 1, 1979.

12. I further note that the provisions of Section 19 and 21 of the Ontario Human Rights Code provide for payment of a sum of money to the party aggrieved, and I believe that the filing of a Complaint, pursuant to the provisions of Section 15 of the said Act, is time limited by the provisions of Section 45(1)(h) of the Limitations Act, appended as Exhibit "E" hereto. 38

With respect to the point raised in the quoted paragraph #11 of the Affidavit, as I have already stated at length, I regard the second Complaint of Mr. Lee as an amended Complaint in respect of Mr. Lee's first Complaint, and not a "fresh" Complaint. Paragraph #11 of the Affidavit, and the Affidavit generally, begs this question and proceeds to argue on the incorrect premise that Mr. Lee's Complaint dates just from May 22, 1981.

However, accepting for the purpose of argument that Mr. Lee's Complaint dates from May 22, 1981, I shall now deal with the "limitation of action" issue. All of these questions turn upon the issue as to when, if ever, a Complaint, or amendment thereto, can no longer be initiated under the Ontario Human Rights Code by reason of paragraph 45(1)(h), or any other provision, of The Limitations Act or by reason of any other statutory provision.

Under the Code there are no limitation periods for filing a complaint or for proceeding to a board of inquiry. Nor does the Statutory Powers Procedure Act³⁹ prescribe any time limit for the commencement of administrative proceedings. The Limitations Act is the only Act that speaks to limitations periods. Does it apply to proceedings under the Code? I find that it does not. Sub-paragraph 1(a) of the Limitations Act

39. R.S.O. 1980, c. 484.

defines "action" to include " an information on behalf of the Crown and any civil proceeding". An action before a board of inquiry is an administrative proceeding. It is neither "an information on behalf of the Crown" nor a civil proceeding. Under the rule of statutory interpretation inclusio unius est exclusio alterius, the express inclusion of criminal and civil proceedings excludes all other types of proceedings from the application of the Act. Thus, the Limitations Act does not apply to proceedings before a board of inquiry.

I have characterized the proceeding before a board of inquiry as an "administrative proceeding" rather than a "civil proceeding". I take this view because, in my opinion, there is a fundamental distinction between a board of inquiry, which to my mind is clearly an administrative tribunal, and a court of law. It is only a court of law before which there can be a civil proceeding. It is true that a board of inquiry can make an order that includes compensation to an aggrieved Complainant, and this aspect of an order is analogous to an award given by a court in a civil proceeding. But nevertheless, there is a fundamental distinction between the intrinsic nature of the bodies under consideration, and I have no doubt, given the Code and the Statutory Powers Procedure Act, that a board of inquiry is an administrative

tribunal and the proceeding before it is, therefore, in the nature of an administrative proceeding.

Admittedly, on occasion, the distinction between a body that is merely an administrative tribunal and a court of law can be rather fine. This issue arose before the House of Lords in Attorney General v. B.B.C.^{39a} Lord Edmund-Davies stated:

Are there, then, any identifiable hallmarks of an 'inferior court'? Eveleigh LJ considered that they are six in number, and said ([1979] 3 All ER 45 at 55, [1979] 3 WLR 312 at 323):

'In my opinion, the first is that [the tribunal] should have been created by the state. At one time courts were created or recognised by the monarch. Now they are created by Parliament. Thus, while an arbitration tribunal may contain many of the attributes of a court, it will lack this first essential one. Secondly, it must conduct its procedure in accordance with the rules of natural justice. Thirdly, that procedure will involve a public hearing with the power at least to receive evidence orally, to permit the oral examination and cross-examination of witnesses and to hear argument on the issues before it. Fourthly, it arrives at a decision which is final and binding as long as it stands. Fifthly, there will be two parties at least before it, one of whom may be the Crown, who are interested in the decision. Sixthly, the decision will be concerned with legal rights.'

...

At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hallmark by which a 'court' or

39a. [1980] 3 All E.R. 161 (H.L.).

'inferior court' may unerringly be identified. It is largely a matter of impression. My own firm view is that a local valuation court is not such a body. I would add that, if Parliament had it in mind to bring local valuation courts within the contempt procedure by which the Divisional Court is empowered to protect 'inferior courts', it is regrettable that they did not make this clear by legislation, as they have already done in several other Acts of Parliament cited to your Lordships and ranging from the Tribunals of Inquiry (Evidence) Act 1921, s 1(2) to the Parliamentary Commissioner Act 1967, s 9. Yet nothing of the sort has been done, and this despite the recurring opportunities of conveniently doing so which have arisen since the Local Government Act 1948 first created local valuation courts. 39b

Lord Scarman stated:

Though the United Kingdom has no written constitution comparable with that of Australia, both are common law countries, and in both judicial power is an exercise of sovereign power. I would identify a court in (or 'of') law, i e a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this contest judicial power is to be contrasted with legislative and executive (i e administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless

39b. Id, at 174-176.

a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court in law. 39c

The board of inquiry clearly does not exercise the broad judicial functions of courts. Its jurisdiction is limited to hearing and deciding cases that arise under one statute, namely, the Code. It is part of the administrative arm of the state. In my view, a board of inquiry is properly characterized as an administrative tribunal. It is not necessary to speculate as to why no limitation period has been included in the Code or the Statutory Powers Procedure Act, but it would seem to me that given the important public policy purpose of the Code, that the legislature desires a tribunal to consider a complaint on its merits, and that a complaint not be outlawed automatically when the formal complaint has not been initiated within a limited time frame.

Counsel for the Commission brought to my attention section 31 of the Interpretation Act^{39d} which states that "The interpretation section of the Judicature Act extends to all Acts relating to legal matters", and section 1(a) of the Judicature Act^{39e} which defines "action" even more narrowly than the Limitations Act:

39c. Id., at 181-182.

39d. R.S.O. 1980, c. 219.

39e. R.S.O. 1980, c. 223.

1(a) "action" means a civil proceeding commenced by writ or in such other manner as is prescribed by the rules.

As I have held that this proceeding is administrative rather than civil, I do not find these sections to be helpful.

Counsel for the Commission also referred to a 1913 decision

--Re Woodhouse^{39f}--wherein the Ontario Court of Appeal held that "action" as it is defined in the Judicature Act^{39g}

does not include an objection filed in the Land Registry Office against an application to bring a parcel of land under the Land Titles Act^{39h}. I do not find that case to be of much assistance here.

Counsel for the Commission also referred to the recent Supreme Court of Canada decision in Board of Governors of Seneca College v. Bhadauria³⁹ⁱ wherein it was held that a civil action may not be brought in respect of a violation of a right under the Ontario Human Rights Code. The Court said:

...the enforcement scheme under the Ontario Human Rights Code ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to full curial enforcement by wide rights of appeal which, potentially, could bring cases under the Code to this Court. 39j

39f. (1913), 14 D.L.R. 285 (Ont.C.A.).

39g. R.S.O. 1897, c. 51.

39h. 1 Geo. V. (Ont.), c. 28.

39i. (1981), 2 C.H.R.R. D/468 (S.C.C.).

39j. Id, at D/472.

I believe it can be inferred from this decision that the Supreme Court did not consider a board of inquiry proceeding to be a proceeding in respect of a civil action.

The Court referred to board of inquiry proceedings as "adjudicative or quasi-adjudicative". That characterization does not render the proceeding a civil proceeding. It merely requires a board of inquiry to comply with the rules of procedure as set out in the Statutory Powers Procedure Act and with the rules of natural justice. It remains an administrative proceeding and, as I have said above, The Limitations Act does not apply to administrative proceedings.

Counsel for the Respondents did not refer to any cases with respect to whether the word "action" as used in The Limitations Act includes administrative proceedings. He did refer to an article by Mr. John I. Laskin wherein the author speculated that The Limitations Act might apply to proceedings under the Code but did not present any arguments or cite any cases in support of this speculative view.^{39k} The mere speculative opinion of one writer does not persuade me to alter my decision.

Both counsel submitted several cases discussing the

39k. (1980), 2 Advocates Quarterly 290, at 309, note 56.

meaning of the phrase "damages or a sum of money" as it is used in paragraph 45(1)(h) of The Limitations Act. As I have held that The Limitations Act does not apply to board of inquiry proceedings under the Ontario Human Rights Code, it is not necessary for me to address this issue.

Accordingly, in my opinion, The Limitations Act has no application to the situations before this board of inquiry. I might add that if I had found it did apply, it could only affect the Tabar Complaint, the first of his Complaints not being filed until more than two years after the factual situation complained about occurred.

In Hyman v. Southam Murray Printing et al.⁴⁰ Professor John McCamus discussed the effect of unreasonable delay in the initiation and prosecution of proceedings under the Ontario Human Rights Code. In that case, the first complaints were filed against the employer on July 19, 1977, with respect to incidents occurring between September, 1973, and June 27, 1977, and against the union on February 8, 1978, with respect to incidents occurring between July 8, 1977, and about mid-summer, 1977. The second complaints were filed against the employer and union on November 29, 1979 with respect to incidents since the first complaints as well as some of the prior incidents. The board of inquiry was not appointed until May 18, 1981, four years after the first complaint was filed.

40. (1982), 3 C.H.R.R. D/617 (Ont.--McCamus).

Professor McCamus held that a board of inquiry has no jurisdiction under the Code to dismiss a complaint at the commencement of proceedings on the basis of alleged unreasonable delay. He said that the Minister, when he appoints a board under section 14a (now section 17), is aware of any delay. If despite this knowledge, the Minister exercises his discretion and appoints a board, the board cannot then dismiss the complaint solely because of the delay without hearing the merits as it was appointed to do. He said:

Under Section 14a of the Code the Minister is given a discretion to appoint a Board of Inquiry to hear and decide a particular complaint. One of the facts that will be evident to the Minister on the face of the complaint is the amount of time which has passed between the alleged incidents and the initiation of the formal complaint. Once the Minister has appointed a Board of Inquiry to "hear and decide the complaint", it would be a surprising interpretation of the mandate conferred on the Board of Inquiry that would permit it to dismiss the complaint without making a decision as to its merits on the basis of the facts which must have been apparent to the Minister at the time of making the appointment. 41

He said that unreasonable delay can be taken into account in assessing the appropriate remedy but that it cannot be a basis for dismissing the complaint unless the delay results in such evidentiary problems that the facts cannot be established with sufficient certainty to determine the issue.

I also find support for this decision in Finlayson v.

41. Id., at D/621.

City of Winnipeg et al.⁴² where a Manitoba board of inquiry dismissed an argument by the Respondents that it should not hear the complaint because of unreasonable delay in prosecuting the complaint. The complaint had been filed in July 18, 1978, and the board appointed on October 2, 1980. The board found that the delay of over two years was not unreasonable.

42. Supra, note 11.

(7) Complainants not the persons directly discriminated against

Assuming that the allegations contained in the Lee and Tabar Complaints are substantiated, can Mr. Lee and Mr. Tabar be successful in complaining of discrimination in respect of themselves as individuals? In essence, the situation as alleged was that in discriminating against third parties (those individuals seeking to purchase the businesses of the Complainants and obtain an assignment of lease or sub-lease in connection with such purchases), the Complainants suffered injury. They allege that as they could not sell their businesses, given the refusal of the Respondents to consent to the assignment of lease, or consent to a sub-lease, the Complainants lost money. Can they, as individuals, succeed on this basis in obtaining compensation under the Code?

Mr. Tabar is a Christian Arab from Israel. Mr. Lee is of Korean ancestry. Is it possible that given the alleged discrimination of the Respondents toward persons (prospective purchasers for their businesses) of a visible minority on a racial basis, that the Complainants felt personally insulted and offended? The evidence suggested that while each found such racially discriminatory remarks offensive from a personal standpoint, the main impact from the Complainants' standpoint was the consequential economic loss through losing a prospective purchaser.

Section 19 of the Code reads:

19. The board, after hearing a complaint,

- (a) shall decide whether or not any party has contravened this Act; and
- (b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.
(emphasis added)

If it is found that Mr. Lee and Mr. Tabar were not personally discriminated against but rather their prospective purchasers were, does the board have the power to order compensation of Mr. Lee and Mr. Tabar for losses that they allegedly suffered because of the discrimination of third parties?

In Jahn v. Johnstone⁴³ a landlord had been found to have discriminated against the Complainant's black dinner guest requiring that he immediately leave the property and threatening that the Complainant would have to move out if her guest did not leave. The landlord gave the Complainant a month's notice to quit on the grounds that she had "disgraced" the property by bringing a black man onto it. The board found that subsection 3 (1)(b) was broad enough to order the landlord to compensate the Complainant even though she had not been the one discriminated against. Subsection 3(1)(b) reads:

3.--(1) No person...shall,

- (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any housing accommodation,

43. September 16, 1977 (Ont.--Eberts).

because of race,...nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons. (emphasis added).

The board said:

To deal with the second element of the section, one asks whether the discrimination against Ms. Jahn arose because of "the race...of any other person or class of persons." The connection between the visit of Keith McGhie and the events of August 7 is, on the evidence, clear and unmistakeable. There is apparently no limitation in the section on the range of "any other persons" who can attract to a complainant punishable discrimination. The section is not limited to redressing discrimination against a tenant or would-be tenant because of the characteristics of his or her closest associates: spouses, lovers, children. It is framed so broadly that a tenant or would-be tenant is protected against discrimination arising from the landlord's attitude toward third parties completely unknown to the tenant, as for example where the landlord rejects a tenant because he or she is not the same race or nationality as all the other tenants presently in the building.

...
Section 3(1)(b) recognizes that there are other factors besides the characteristics of the tenant or would-be tenant which might result in discriminatory treatment and seeks to broaden the tenant's protection against discrimination for those causes. Secondly, the section aims at preventing the punishment by private parties - in this case, landlords - of those who in their own lives adhere, without fanfare, to the ideals espoused in the Code. Tradespeople who deal evenhandedly with customers, suppliers, and employees, of whatever race, religion, nationality or sex; and householders who extend the warmth of family ties or of hospitality to people of different origins should not be deterred from doing so by the intervention of those to whom they look for security of tenure. (emphasis added) 44

Likewise, if the allegations in this case are proven, Mr. Lee and Mr. Tabar were being punished by West End and Mr. Scott for attempting to adhere to the ideals of the Code. If the

44. Id., at 17-18.

allegations are proven, they were prevented from dealing fairly with purchasers of different origins by their landlord.

The board in Jahn found that by not allowing the tenant to invite black persons into her home, the landlord interfered with her covenant of quiet enjoyment. The board said:

This contraction of her right to quiet enjoyment of the premises from one which is to be available for "all usual purposes" to one which would be available "for all usual purposes except the offering of hospitality to blacks" is a discrimination or differentiation in a term or condition of occupancy which operates against Ms. Jahn. She is thereby put in a worse position than other tenants who enjoy the covenant of quiet enjoyment to its full extent; it is immaterial that these "other" tenants are not tenants of Mr. Johnstone, but tenants in Ontario generally. 45

Likewise, if the allegations in this case are proven, Mr. Lee's and Mr. Tabar's rights to alienate their commercial leasehold interests is restricted by their landlord on a prohibited ground putting them in a worse position than other commercial tenants in Ontario. They are being personally discriminated against with respect to a term or condition of occupancy.

In Jahn the remedy included requiring the landlord to compensate the Complainant for moving expenses and the rent differential between her new apartment and the one she rented from Mr. Johnstone. He was also required to pay her \$200.00 to compensate her for her loss of dignity resulting from her embarrassment at having to ask her black guest to

45. Id., at 16.

leave. If the Complainants prove their allegations, under paragraph 3(1)(b) they could be fully compensated for their losses and expenses flowing from the landlord's discriminatory treatment of their purchasers and for their loss of dignity for being required to refuse to sell on prohibited grounds.

In Singer v. Pennywise Foods Ltd.⁴⁶ the complaint concerned a publicly displayed sign featuring a "black sambo" caricature. The Complainant was Caucasian. The Saskatchewan Human Rights Commission Act⁴⁷ required the Commission to inquire into any person's complaint of an infringement of a right. The board held that this provision was broad enough to permit this Complainant to file this complaint. The Respondent applied for certiorari on the grounds that, as the complainant was not directly affected in the sense of being personally discriminated against, he did not enjoy a right to make a complaint to the Commission. The Court of Queen's Bench for Saskatchewan denied certiorari on this ground saying that the words "any person" in the Act meant what they said and, therefore, included this Complainant. The Court of Appeal agreed on this point.

Therefore, it is my view, that if the Complaints are proven, Mr. Lee and Mr. Tabar can be compensated for their losses arising from the discrimination of their prospective purchasers.

46. November 5, 1976 (Sask.--Taylor); certiorari granted October 5, 1977 (Sask.Q.B.); reversed on appeal, May 29, 1978 (Sask.C.A.).

47. S.S. 1972, c.S-25, s.9.

In my opinion, if the allegations are proven, then the complainants are protected by paragraph 3(1)(b) which straightforwardly says that 'no person shall discriminate against them with respect to any term or condition of occupancy of their commercial unit because of the race, nationality, ancestry or place of origin of another person: If the allegations are proven, there would be discrimination against the Complainants personally for a breach of paragraph 3(1)(b).

The English Employment Appeal Tribunal in Zarczynska v. Levy^{47a} dealt with an analogous situation. An employer instructed his barmaids not to serve coloured people. An employee barmaid disagreed and her employment was terminated. Applying a purposive construction to the Race Relations Act 1976, the appeal tribunal allowed the barmaid's appeal claiming compensation for herself as a complainant who had been personally discriminated against, since she had been treated as an employee less favourably on racial grounds than barmaids who obeyed the unlawful instruction of the employer.

47a. [1979] 1All E.R. 814

(8) General Observation

It was with reluctance that I dealt with these procedural issues at such length. The purpose of having human rights cases adjudicated by boards of inquiry rather than by courts is to avoid the strict court rules of procedure.

The Ontario Court of Appeal, in its recent decision in Re City of Toronto and C.U.P.E. Local 79⁵², admonished Labour Arbitration Boards for writing long dissertations on the law of procedure. The Court said:

It is, therefore, surprising to observe the extent to which arbitration awards purport to deal with complex questions of law. Many arbitration board decisions cited to us contain scholarly dissertations on important substantive and procedural rules applicable to judicial proceedings. They exemplify the extreme legal formalism and adherence to technical rules which overhangs the arbitration process. At best these elaborate legal studies may be irrelevant because Boards are not bound in their procedure by technical rules of law and procedure. At worst, they can cause delay and unnecessary expense and, as the argument in this appeal demonstrated, they could obscure the real issues confronting an arbitration board and confuse it in the performance of its duty. While it may be helpful for arbitration boards to seek guidance by way of analogy from established legal procedures, they risk committing jurisdictional error by rigid adherence to them.

53

The Court urged administrative tribunals to "...proceed with the maximum of common sense and a minimum of technicality."⁵⁴

52. (1982), 35 O.R. (2d) 545 (Ont.C.A.).

53. Id., at 558.

54. Id.

In my view, this advice should be kept in mind by boards of inquiry deciding cases under the Ontario Human Rights Code. The rules of procedure that this board is bound by are those expressed by the legislature in the Code and in the Statutory Powers Procedure Act. Both of these Acts give boards considerable discretion with respect to matters of procedure so that complaints can be dealt with truly on the merits. As the Ontario Court of Appeal said, supra, for the boards to adhere strictly to any other rules of procedure might amount to a jurisdictional error.

In this case, counsel for the Respondents presented his motion for dismissal just at the outset of the hearing, with no prior notice to myself. The complainants were present and ready to proceed with the hearing on the merits. I heard oral argument from both counsel with respect to the motion, and reviewed the evidence as given in the exhibits submitted in respect of the motion, and heard the evidence of a witness called by the Commission and Complainants in respect of some factual aspects pertinent to the issues raised by the motion.

At the conclusion of argument, I decided that this motion for dismissal on a multitude of technical bases was without merit, and I dismissed the motion, with oral reasons, reserving

with respect to one issue (the 'Limitations Act' issue) but undertaking to give written reasons in respect of all the issues raised by the motion and to make a decision at that later time in respect of the one issue that I reserved on. I then gave a brief adjournment at the request of the Respondents' counsel so that he could consult with his client and consider whether they wished to proceed forthwith with the hearing or appeal to the Divisional Court with respect to my rulings on the motion to dismiss (Transcript, p. 49). Counsel returned at the conclusion of the adjournment advising that he wished to proceed (Transcript, pp. 51-52), and I proceeded to hear the evidence and consider the Complaints on the merits.

Before concluding, there is one additional issue to refer to.

(9) Additional grounds of complaint

During Mr. Lee's evidence (Transcript, pp. 134-136), it occurred to me that if Mr. Lee's evidence was to be accepted, then perhaps there was a possible breach of paragraphs 6(d) and (e), (f), (g) or (h) of the Code by the Respondent David Scott. There was no cross-examination by the Respondent's counsel on the conversation that Mr. Lee alleged he had with Mr. Scott that gave

rise to this possible suggestion.

However, Walter Stanley Gonet, Q.C., Mr. Lee's solicitor at the relevant times, also testified. At this point in time, in the cross-examination of Mr. Gonet, Respondents' counsel asked:

Q. Was there any suggestion in that conversation that he was discriminating against Mr. Lee?

A. Not that he was discriminating against Mr. Lee, no.

Q. I see.

A. Against the purchaser, yes.

THE CHAIRMAN: Let me ask a question at this point, Mr. Richardson, because you might want to cross-examine on it, depending upon what the witness says: Now, the complaint of Mr. Lee was signed March 14th, 1979, and I understand, from what you have said, Mr. Gonet, that you did have some conversations with Mr. Lee, thereafter, when the bailiff seized the equipment...

THE WITNESS: Yes.

THE CHAIRMAN: ...etc. But you didn't speak with Mr. Scott, thereafter?

THE WITNESS: No. No, I...

THE CHAIRMAN: You might have tried to get Mr. Scott at one time...

THE WITNESS: I tried to get...

THE CHAIRMAN: In fact, you said, you did try to get him at one point.

THE WITNESS: Yes, that is correct.

THE CHAIRMAN: Did Mr. Lee, in these later conversations, ever refer, in speaking with you, to any comments that Mr. Scott, may have made to him about the fact that a complaint had been made by Mr. Lee?

THE WITNESS: This would have been in late... it would have been...it would have to be after the store was really all sort of closed up or on its dying days; he mentioned that Mr. Scott didn't like that idea that this action had been commenced with the Ontario Human Rights Commission, and that he suggested to him that maybe, bygones, be bygones, and that we sort of try to resurrect a deal and he would consent, if this action was dropped.

THE CHAIRMAN: And, when, as best you can, would Mr. Lee, have told you that?

THE WITNESS: It would have been after he was closed out of the store.

I am pretty sure it was after he was closed out of the store. And, everything just sort of fell apart. And he had to sell...he was selling the...he was selling the fixtures because the goods had all been sold by the bailiff and I think he was selling the fixtures, at that time.

THE CHAIRMAN: We will go back to the cross-examination, Mr. Richardson. The reason I brought this up and my next comment, I wouldn't want anyone to think that I am making any findings on the evidence, I am just referring to the evidence, as has been given to this point, by Mr. Lee and Mr. Gonet, in respect of what Mr. Scott said to Mr. Lee, in respect of the complaint having been made, and, I emphasize, I am not making any findings on the evidence at this point, but the evidence might suggest that Section 6 of the Code, was breached by Mr. Scott.

Now, at this point, I only leave that for the consideration of Ms. Minor. I appreciate that that is not an express allegation in the complaint. I appreciate, also, I am certain, Mr. Richardson, that if a motion was made to amend the complaint, that you would raise all of your arguments, '...a fortiori', that you raised at the beginning of the hearing in respect of that sought amendment to the complaint.

55

My reasons for the above line of questioning were as follows. By that point in time (May 19) I had done some

review of the law in respect of the motion to dismiss made by the Respondents' counsel at the very outset of the hearing (May 17) in preparation of my written reasons, and because of that review of the law, the following occurred to me.

Mr. Lee's Complaint alleges a breach only of paragraphs 3(a) and/or (b) of the Code. The question then arises--where the evidence given at a board of inquiry suggests that there may be a breach of another provision of the Code, which provision is not referred to in the Complaint--can, and should, the board of inquiry consider this issue?

Mr. Lee's evidence suggested that after the filing of his first Complaint, March 14, 1979, Mr. Scott tried to intimidate him to drop his complaint, by saying that he, Mr. Scott, would now only consent to an assignment of the lease if Mr. Lee dropped his Complaint. Mr Scott had not yet testified, of course.

My review of the law in preparation of my written reasons in respect of the Respondents' motion at the outset of the hearing, suggests that a Complaint can be amended as late as the actual hearing, to include an allegation of a breach of an additional provision of the Code.

I have already referred to Chairman Ratushny's decision in Cooper v. Belmont Property Management, 55a. In that case, the black superintendent of an apartment building complained that his employment was terminated because of his race and colour. At the hearing, his wife who was white, sought to be added as a complainant, alleging that her own employment was terminated because of her marital status (she being married to a black man). Referring to what is now paragraph 19(a), which requires the board to "decide whether or not any party has contravened" the Code, Chairman Ratushny stated:

"In my opinion, that section does not restrict the decision of a board to determining the specific complaint. Rather, it requires the board to decide whether the proceeding discloses any contravention of the Code.

Thus, "to hear and decide. . . the complaint made by Roland Cooper" means to decide it as required by the Code. The Code in turn requires that the decision be whether or not the proceedings disclose any contravention of the Code.

. . . .
In my opinion, the allegations of contraventions of the Code which arose indirectly in the course of the proceedings were so related to the actual complaint of Roland Cooper that the parties against whom a finding of contravention might be made could suffer no prejudice because of the absence of specified allegations under s.8 "55b."

55a Supra, Note 21.

55b Id, at 6-7.

In Cousens v. Canadian Nurses Association⁵⁶, Chairman

E.J. Ratushny dealt with the question of a motion at the hearing for an "additional ground" to be included in the Complaint.

Chairman Ratushny held:

Therefore, it was argued, if at any time subsequent to the appointment of a board of inquiry, another ground of discrimination becomes apparent, that additional ground can only be considered if the Minister of Labour makes another appointment of a board specifying the additional ground.

This Board cannot accept that argument. Section 14b.(6) [now section 18(6)] which deals with the jurisdiction of a board of inquiry, speaks in terms of the board "...reaching a decision as to whether or not any person has contravened this Act...". Reference has already been made to section 14c.(a) [now section 19(a)]. Moreover, section 14b.(1)(e) [now section 18(1)(e)] specifically authorizes the board to join additional persons as parties to the complaint. Would it not be anomalous for a board of inquiry to be authorized to add new parties to the complaint but to be precluded from modifying the grounds of the complaint against an existing party?

The wording of sections 14b.(6) and 14c.(a) are sufficiently broad to bear the practical interpretation that a board of inquiry has jurisdiction to amend the alleged grounds of contravention specified in a complaint. Surely, it was not intended that the Minister of Labour should have to make an additional appointment simply because, in preparation for the hearing, another possible ground of contravention has become apparent. It is clearly in the interests of all of the parties and the citizens of Ontario that the substantial complaint be dealt with at one hearing taking into account all of the possible ways in which any party may have "contravened this Act".

56. (1981), 2 C.H.R.R. D/365 (Ont.--Ratushny).

However, it must be emphasized that the jurisdiction to modify the alleged grounds of discrimination, carries with it the obligation of providing adequate notice. Failure to provide sufficient notice to the parties and, where appropriate, the opportunity to adjourn for further preparation could result in a board of inquiry depriving itself of jurisdiction by failing to provide a hearing as required by section 8 of the Statutory Powers Procedure Act, S.O. 1971, c. 47, which provides:

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

57

The opinion expressed by Chairman Ratushny impresses me as a correct interpretation of the Code.

Given the suggestion of Mr. Lee's evidence, and the concluding question in the Respondents' counsel's cross-examination of Mr. Gonet (Mr. Lee's solicitor) it seemed to me incumbent upon me to ask Mr. Gonet questions as to his knowledge, if any, of the factual situation surrounding Mr. Lee's conversations with Mr. Scott. As Mr. Scott was a named Respondent in the proceedings, and there was no apparent prejudice to Mr. Scott from lack of prior notice as to any allegation of a breach of section 6 of the Code (the possibility of an allegation stemmed from a conversation Mr. Lee alleged

57. Id., at D/365-6.

to have taken place between himself and Mr. Scott), I felt that, given the nature of a human rights inquiry, it was incumbent upon me to ask of Mr. Gonet the questions I did. I felt that consideration would have to be given to the issue of amending the grounds of the Complaint if counsel for the Complainants and Commission so requested.

I repeat that I agree with the interpretation of the Code as made by Chairman Ratushny in Cousens. If an application is made in an inquiry to amend a Complaint to provide for an additional ground, given the purpose and intent of the Code, a possible breach of an additional provision should be considered by the board of inquiry, if there is no prejudice to the Respondent from lack of prior notice. The purpose of a board of inquiry is to "hear and decide the complaint"⁵⁸ and "after hearing a complaint,...decide whether or not any party has contravened" the Code.⁵⁹ As Chairman Ratushny said above,

Would it not be anomalous for a board of inquiry to...be precluded from modifying the grounds of the complaint...

...
It is clearly in the interests of all of the parties and the citizens of Ontario that the substantial complaint be dealt with at one hearing taking into account all of the possible ways in which any party may have "contravened this Act".

60

58. Section 17(1).

59. Section 19(a).

60. Supra, note 57.

I emphasize, as did Chairman Ratushny, that the jurisdiction to modify the alleged grounds of discrimination carries with it the obligation of providing adequate notice and where appropriate, the opportunity to adjourn for further preparation.

Given my understanding of my own responsibility as a board of inquiry to determine whether any party has "contravened this Act" and my obligation to provide a party notice of a possible additional allegation and the opportunity to cross-examine, in my view, it was incumbent upon me to ask the questions I did of Mr. Gonet at that point of time in the inquiry, in both the interests of the inquiry and the Respondents.

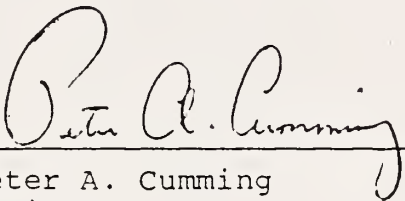
However, counsel for the Commission and Complainants has not sought to amend the Lee Complaint to include as an additional ground any allegation of a breach of section 6 of the Code so that no further consideration has been made in respect of that possible issue.'

Conclusion

For the reasons given, the Respondents' motion on several

bases, to dismiss the Complaints of the Complainants, is dismissed.

Dated at Toronto this 13th day of August 1982.



Peter A. Cumming
Chairman
Board of Inquiry

